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No. 08-865

APR 22 2009

In The
Supreme Court of the United States

CONSOLIDATION COAL COMPANY,

Petitioner,

v.

LEVISA COAL COMPANY,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Virginia

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should certiorari be granted to review part of a state court decision which features no issue of federal law and no constitutional question that was pressed and passed upon below, when that case turns on the interpretation of unambiguous documents under settled principles of state law and the alleged denial of due process arises solely because settled state law does not permit the introduction of extrinsic evidence concerning the interpretation of documents the parties agreed were unambiguous?

RULE 29.6 STATEMENT

Levisa Coal Company, A Virginia Limited Partnership and L.L.P., is not a publicly held corporation and does not have a parent or publicly held company owning 10% or more of the corporation's stock.

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BRIEF IN OPPOSITION

Pursuant to Rule 15 of the Rules of the United States Supreme Court, Levisa Coal Company, A Virginia Limited Partnership and L.L.P. ("Levisa") files this Brief in Opposition to the Petition for Writ of Certiorari filed by Consolidation Coal Company ("Consolidation").

STATEMENT OF THE CASE

The Supreme Court of Virginia ruled that Consolidation had no legal right to dump its wastewater into another mine where Levisa's coal was located. The Court found that the 1956 Lease between Levisa and Island Creek Coal Company ("Island Creek") did not give that right even to Island Creek (who could not have given it to Consolidation). As secondary support for its finding, the Court also interpreted the 1937 Deed, holding that Consolidation had no right to dump foreign water from another mine operated by a completely separate entity, so it could not have agreed to grant others such a right even if it had wanted to.

Consolidation seeks to challenge this legal interpretation of the 1956 Lease, which it interjected into this case as the basis for its right to dump, by making a late claim that its constitutional due process rights have been violated by such a ruling. However, the record reveals that Consolidation represented below that the 1956 Lease was unambiguous and should be construed as a matter of law, only changing its position once the Supreme Court of Virginia rendered its opinion in this case.

Rather than raising any genuine due process issues, this case really relates to the legal interpretation of a single contract, the 1956 Lease, which was properly construed as a matter of law by the Supreme Court of Virginia under well-established state law.

Further, in accordance with Rule 15(2) of the Rules of the United States Supreme Court, Levisa will point to misstatements of fact in Consolidation's Petition for Writ of Certiorari ("Petition").

A. Background

This case concerns the unlawful dumping by Consolidation of billions of gallons of contaminated water into the "VP3 Mine" where Levisa owns substantial coal and has coalbed methane gas interests. (App. 2a, 6a-8a).¹ Levisa leased certain mining rights to Island Creek under the 1956 Lease, but it retained rights to the ownership and continued use of the coal and easements thereto. (App. 4a-5a). In 1993, Consolidation's parent company acquired Island Creek, which remains a separate corporate entity. (App. 6a). Although Consolidation does not own or even lease the right to mine the coal within and around the VP3 Mine, it has been unlawfully using that mine as a "storage pit" for disposal of its high chloride wastewater, which could not otherwise be legally dumped into the local river from its coal mining operations at the entirely separate "Buchanan Mine." (App. 2a, 7a-8a).

¹ References to the Appendix contained in the Petition for Writ of Certiorari will be denoted "(App. ____)."

Consolidation has been dumping this contaminated water into Levisa's coal mine at a rate of 2,500 gallons per minute. (App. 8a). The "inundation" of wastewater at the VP3 Mine has continued, with only limited interruption since 2006.

B. Procedural History

In 2006, Levisa filed a Complaint for Injunctive Relief and Declaratory Judgment against Consolidation in the Circuit Court for Buchanan County, Virginia ("circuit court"). (App. 8a). Levisa sought a declaration that Consolidation had no legal right to dump and store its Buchanan Mine water in the VP3 Mine, and temporary and permanent injunctive relief to prevent the continued dumping. (App. 8a-9a).

Consolidation filed responsive pleadings maintaining that it had the legal right to dump its chloride water into the VP3 Mine because Island Creek had those rights under the 1956 Lease and had agreed to allow Consolidation to dump into the VP3 Mine. (App. 9a-10a). Although Consolidation mentions in its Petition that it filed affirmative defenses, it does not claim that those defenses relate to the matter before this Court; rather, the new due process claim is based on unrelated matters never raised in the circuit court. (Pet. 8).²

² References to the Petition for Writ of Certiorari will be denoted "(Pet. ____)."

The Evidentiary Hearing

Following discovery,³ the circuit court conducted a two-day evidentiary hearing on Levisa's request for entry of a preliminary injunction. (App. 10a). At that hearing, Consolidation claimed that the 1956 Lease answered the question whether Consolidation had the right to dump water into the VP3 mine. (J.A. 249-251, 255, 257-258).⁴ Indeed, Consolidation even claimed that Levisa was ignoring the 1956 Lease, (J.A. 250, 283), and would "lose once the lease comes into play." (J.A. 284).

In its opening statement, Consolidation introduced the circuit court to what would be the legal linchpin of its case – the 1956 Lease and the 1937 Deed. (J.A. 249, 257-258). Consolidation described the two contracts as the "operative agreements" in the case. (J.A. 257).

Consolidation incorrectly states in its Petition that the *only* argument it asserted at the hearing was that Levisa could not establish that it would suffer any irreparable harm. (Pet. 9). It also incorrectly states that it "specifically declined to address the legal question whether Consolidation had the right to store water in the mine." (Pet. 9). Consolidation is wrong.

³ Consolidation states in its Petition that there was "only preliminary discovery." (Pet. 8). However, the Supreme Court of Virginia found that "[t]he parties engaged in a lengthy period of discovery." (App. 10a).

⁴ References to the Joint Appendix filed in the Supreme Court of Virginia will be denoted "(J.A. ____)."

At the hearing, Consolidation took a firm stance that the 1956 Lease and 1937 Deed were unambiguous, and invited the circuit court to interpret them without the aid of any additional evidence. Consolidation's counsel stated:

Here the lease didn't say anything about preventing the lessee from storing water and granted in addition specific rights. In terms of contract interpretation I suggest to the Court that the [coal] lease and the other documents are clear and unambiguous and the Court can and should interpret the documents and I don't think extrinsic evidence is necessary or proper. And those leases are before you and can be taken by this plaintiff.

(J.A. 286).

Further, Consolidation objected to any evidence bearing on the interpretation of the 1956 Lease, "because that's [the court's] responsibility unless [Levisa's counsell] is going to say that this agreement is ambiguous and he wants to introduce extrinsic evidence." (J.A. 451). Consolidation also asserted that "it is for the Court and not for any particular witness to tippy-toe through the document and start interpreting it." (*Id.*) Levisa agreed with Consolidation that the lease was unambiguous. (J.A. 453). And the circuit court agreed that it would interpret the plain language of the lease without parol evidence: "The lease speaks for itself,

obviously. . . . I can't imagine that counsel is offering the witness and asking these questions to interpret the lease to the Court, the Court certainly is going to do that." (*Id.*)

In unequivocal terms, Consolidation told the circuit court that the documents "are controlling," "will speak for themselves," are "unambiguous," and contain "plain language." (J.A. 275, 283, 285, 286). Therefore, Consolidation not only identified the 1956 Lease and 1937 Deed as the controlling documents in the case, but also asked the circuit court to interpret them right then and there.

Consolidation pressed upon the circuit court the very interpretation of the 1956 Lease that it unsuccessfully argued to the Supreme Court of Virginia, and continues to urge now. (App. 11a; J.A. 249, 257-262, 283, 285-286, 652-657). In its argument to the circuit court, Consolidation declared that its rights under the 1956 Lease "are extremely broad." (J.A. 656). Under Consolidation's reading of this unambiguous document, "Island Creek Coal's storage of the Buchanan Mine water in the VP3 Mine was a 'use of the leased premises which [Island Creek Coal] may deem needful or convenient in carrying on its mining or other operations' as contemplated by the 1956 lease." (App. 11a; J.A. 285-286). Relying upon its interpretation of the 1956 Lease, Consolidation argued that Levisa did not have a valid underlying claim on the merits. (J.A. 283).

Although Consolidation introduced evidence at the hearing⁵ and offered numerous arguments to the circuit court concerning its legal rights as well as the 1956 Lease and the 1937 Deed, it at no time even mentioned the Pobst/Combs Deed or the 1908 Deed that it now claims are vital to an interpretation of the “controlling documents” in this case. Consolidation argues in its Petition that “Levisa did not offer the Pobst/Combs Deed or the 1908 Deed, presumably because these documents were not helpful to its case (emphasis in the original).” (Pet. 8). Consolidation tries to shift the focus to Levisa rather than address the sweeping admissions it made below about the “unambiguous” and “plain” 1956 and 1937 documents which “speak for themselves.” (J.A. 275, 283, 285, 286). In light of Consolidation’s unequivocal argument that these unambiguous documents *alone* determined whether it had the legal right to dump, it hardly can ask why the two deeds which it never mentioned were not placed in the record.

Further, Consolidation incorrectly states in its Petition that “[i]nterpreting the 1956 Lease requires looking not only at the lease agreement itself, but also at other deeds and leases in the chain of title that are expressly referenced in the 1956 Lease.” (Pet. 4). The 1956 Lease references the 1937 Deed, which was in evidence and actually considered by the courts below, but it does not reference the

⁵ Among the documents that Consolidation introduced as evidence below included an opinion of counsel asserting that Consolidation had the right to dump in the VP3 Mine under the 1956 Lease and a letter from its Senior Counsel (in-house) to Levisa making the same assertion. (J.A. 849-858).

Pobst/Combs Deed or the 1908 Deed. (App. 39a-43a; J.A. 669-688). The two documents which form the basis for this due process claim are not even mentioned in the 1956 Lease.

After Levisa rested its case, Consolidation moved to strike, and the circuit court sustained the motion, finding that Levisa was not entitled to a preliminary injunction. (App. 14a). The circuit court then resolved the declaratory judgment on the basis of the 1956 Lease – precisely as Consolidation had asked it to do. Applying a broad interpretation of Island Creek's rights under the lease, the circuit court ruled that Consolidation “has the right to place any kind of storage water in the [VP3] [M]ine.” (App. 15a).

The Circuit Court's Order

Without objection from Consolidation, the circuit court entered a final order on the injunction and declaratory judgment on December 22, 2006. With respect to its resolution of the declaratory judgment, the circuit court stated in plain terms that it “has construed the November 16, 1956 Lease, and the rights imparted therein” and “has adjudicated by declaratory judgment that Defendant has the right to store excess water from the Buchanan No. 1 in the VP3 Mine.” (App. 31a). Again, the circuit court did exactly what Consolidation asked it to do.

Appeal to the Supreme Court of Virginia

Levisa appealed to the Supreme Court of Virginia, challenging both the circuit court's declaration that the 1956 Lease gave Consolidation the legal right to pump its water into the VP3 Mine and its denial of

injunctive relief. (J.A. 230). It asserted 12 distinct assignments of error. Even though Levisa's appeal placed the question of Consolidation's legal right to dump water into the VP3 Mine squarely before the Supreme Court of Virginia, Consolidation did not challenge the fact that the circuit court resolved the contract interpretation question as a matter of law without any parol evidence from Consolidation. Consolidation had already told the circuit court that its legal right to dump water in the VP3 Mine could be determined by interpreting the unambiguous 1956 Lease and 1937 Deed without any additional evidence. Thus, the circuit court did exactly what Consolidation invited it to do.

Consolidation never asserted any claim or argument that, in the event of reversal, it was entitled to introduce evidence on the declaratory judgment. In its brief in opposition to Levisa's petition for appeal, Consolidation failed to assign any cross-error, lodging no objection to the circuit court's interpretation of the 1956 Lease or its failure to consider evidence Consolidation might offer in support of that construction. Virginia attorneys are well-aware of the strict procedural requirements in the Supreme Court of Virginia which mandate that all error must be asserted when the appeal is presented to the court. Cf. Va. S. Ct. Rule 5:18 (the brief in opposition to a petition for appeal "may include assignments of cross-error and . . . no cross-error not then assigned will be noticed by this Court.") If Consolidation opposed interpretation of the 1956 Lease or the 1937 Deed as a matter of law without parol evidence, its opportunity to complain was provided below.

The Supreme Court of Virginia awarded Levisa an appeal on each one of its 12 assignments of error. (App. 16a).

The Supreme Court of Virginia's Rulings

Consolidation aggressively sought to prevent the Supreme Court of Virginia from reaching the merits of Levisa's appeal, filing two motions to dismiss and asserting various waiver arguments. (App. 17a-18a). The Supreme Court of Virginia denied both motions to dismiss, neither of which asserted any due process claim, and rejected the waiver arguments. (App. 17s-18a).

After receiving briefs and argument from the parties, the Supreme Court of Virginia issued a unanimous opinion reversing the judgment of the circuit court. (App. 2a-29a). It held that the circuit court incorrectly interpreted the 1956 Lease, and remanded the case for "further proceedings," including an evidentiary hearing on Levisa's request for a permanent injunction. (App. 25a, 29a).

The Supreme Court based its reversal of the circuit court's declaratory judgment on two grounds. First, the Court held that the plain language of the 1956 Lease simply does not permit the dumping of water from another mine. (App. 19a). Thus, it interpreted the 1956 Lease as a matter of law, rejecting Consolidation's broad reading of the document. Second, the Court held that the 1937 Deed of coal to Levisa "conveyed no right" to dump water from foreign properties and, therefore, because Levisa

never acquired that right, it could not have given such a right to anyone else. (App. 22a-23a). Thus, the Court interpreted the 1937 Deed and the 1956 Lease as a matter of law, as Consolidation had requested.

With regard to the injunction, the Supreme Court noted that the circuit court had "premised" its denial of Levisa's request for injunctive relief, "at least in part, on its erroneous determination" of Consolidation's right to store the wastewater. (App. 23a). Accordingly, without reaching the other assignments of error asserted by Levisa, the Supreme Court reversed the denial of injunctive relief, and remanded the case "for further consideration of that issue by the circuit court." (*Id.*) Because Consolidation "is currently" dumping water from its mine into the VP3 Mine, the Court held that the question on remand is whether Levisa is entitled to a permanent, but not a preliminary, injunction.⁶ (App. 24a-25a). It further noted that Consolidation "must be afforded the opportunity to present evidence" on the question whether Levisa has an adequate remedy at law. (App. 25a).

Post-Opinion Motions in the Supreme Court of Virginia

Consolidation filed a petition for rehearing raising three arguments, all of which it asserted for the first time: (1) that the Supreme Court erred by ruling

⁶ The issue of Levisa's standing to seek injunctive relief was resolved by the Supreme Court, which found "no merit" to Consolidation's argument. (App. 24a).

without a full evidentiary hearing; (2) that the holding violated Consolidation's due process rights; and (3) that the absence of Island Creek, a necessary party, deprived the Supreme Court of the authority to adjudicate this dispute. The Supreme Court denied the petition, (App. 1a), and rejected Consolidation's motion to defer issuance of the mandate.

Remand to the Circuit Court

Following issuance of the mandate, the case was returned to the circuit court for "further proceedings" on Levisa's request for a permanent injunction. After a hearing on February 10, 2009, the circuit court granted Levisa's motion for partial summary judgment and entered a permanent injunction preventing Consolidation's continued dumping of wastewater into the VP3 Mine. (Supp.A.1).⁷ Pursuant to the circuit court's order, dumping would cease on February 19, 2009. (*Id.*)

In an expedited proceeding limited to injunctions in Virginia, Consolidation petitioned one justice of the Supreme Court of Virginia to vacate the permanent injunction. Va. Code § 8.01-626. On March 17, 2009, an Order was entered by the Supreme Court dissolving the injunction so Consolidation could offer evidence in opposition to the request for injunctive relief. Therefore, the ruling which prompted Consolidation's Supplemental Petition to this Court has been reversed, and Consolidation will have an

⁷ References to the Appendix contained in the Supplemental Brief of Petitioner will be denoted "(Supp.A.____)."

opportunity to introduce evidence in defense of Levisa's requested injunction.

ARGUMENT

There are no compelling reasons to grant Consolidation's Petition. Sup. Ct. R. 10. Rather, there are four important reasons why this Court should refuse *certiorari*, each of which, standing alone, demonstrate that the question presented does not merit this Court's attention.

First, Consolidation's appeal asks this Court to grant certiorari to undo that which it expressly invited the Virginia courts to do - to decide Consolidation's rights by interpreting controlling and unambiguous agreements without additional evidence. Second, contrary to Consolidation's argument, (Pet. 12), the Supreme Court of Virginia's ruling does not conflict with this Court's precedent. Third, the Supreme Court of Virginia did not actually decide Consolidation's due process claim and, in any event, Consolidation's arguments to the Virginia courts demonstrate that it should have anticipated the very ruling it now appeals. Fourth, Consolidation has effectively appealed as to only one part of the Virginia court's holding, leaving an independent basis for the ruling unchallenged. Consequently, the appeal presents no compelling question for this Court to decide.

I. THE SUPREME COURT OF VIRGINIA DID NOT DEPRIVE CONSOLIDATION OF DUE PROCESS BY DECIDING ITS RIGHTS UNDER AGREEMENTS

THAT CONSOLIDATION ADMITTED WERE NOT ONLY CONTROLLING AND UNAMBIGUOUS, BUT CAPABLE OF INTERPRETATION AS A MATTER OF LAW WITHOUT EXTRINSIC EVIDENCE, WHICH THE COURT CORRECTLY DID IN ACCORDANCE WITH SETTLED VIRGINIA LAW.

The Supreme Court of Virginia correctly determined the fundamental question of law in this case – whether Consolidation has the legal right to dump wastewater into Levisa's mine – by interpreting two unambiguous agreements without the aid of extrinsic evidence, just as Consolidation asked it to.

A. Consolidation Invited the Virginia Courts to Interpret the Unambiguous 1956 Lease and the 1937 Deed Without Additional Evidence.

This entire appeal rests on Consolidation's claim that it was denied due process because it was not permitted to offer two deeds in the chain of title leading up to the 1937 Deed to Levisa. It asserts that these two deeds would establish that Levisa did, in fact, have the right to dump water from unrelated properties into its coal reserves. Consolidation fails to explain how even such a reversal would alter the Supreme Court of Virginia's independent interpretation of the 1956 Lease, finding it did not grant such rights. However, Consolidation's new argument in favor of extrinsic evidence simply cannot be squared with its longstanding position

that no extrinsic evidence is necessary to interpret the 1937 Deed or the 1956 Lease.

Consolidation invited the Virginia courts to determine its claimed legal right to dump water into the VP3 mine by interpreting the 1956 Lease and the 1937 Deed. (J.A. 249-251, 255, 257-262, 283, 285-286, 652-657). It repeatedly asserted that these two documents alone were determinative of its legal right to dump the wastewater, and characterized these agreements as the "controlling documents" in the issue before the court. (J.A. 257, 275, 283, 285). Underscoring the crucial role these agreements played, Consolidation even accused Levisa of intentionally ignoring them in order to help its case. (J.A. 250, 283-384). Consequently, Consolidation repeatedly reminded the circuit court that it should interpret its legal rights by reference to the 1956 Lease and the 1937 Deed alone, using them as both a sword and a shield.

Consolidation also objected to any evidence relating to the interpretation of the 1956 Lease, and told the circuit court that the 1956 Lease and 1937 Deed were unambiguous and should be interpreted without the aid of extrinsic evidence. (J.A. 285-286, 451, 656). In fact, the parties stipulated that these documents were unambiguous and should be interpreted as written, (J.A. 451, 453), leaving no question as to the court's job in this case. Accordingly, there was complete agreement that no extrinsic evidence was needed to interpret the plain language of the unambiguous documents. Under clear Virginia law, parties may not change their stated position as to whether a legal document is

ambiguous. *Berry v. Klinger*, 225 Va. 201, 206, 300 S.E.2d 792, 795 (1983) (the plaintiffs, "having contended in their pleadings and in their initial arguments at trial that the language in question was unambiguous, will not be allowed to take a contrary position thereafter.")

Similarly, although Consolidation steadfastly maintained throughout the entire case that these unambiguous documents alone decided the rights of the parties, it now asserts a constitutional claim premised on the notion that the 1956 Lease and 1937 Deed do not unambiguously determine the parties' rights. Having stipulated that the fundamental question in this case – its legal right to dump water – can be answered within the four corners of these unambiguous documents, Consolidation cannot maintain now that the Virginia courts should have considered other documents before adjudicating its rights. *Garlock Sealing Techs., LLC v. Little*, 270 Va. 381, 388, 620 S.E.2d 773, 777 (2005) ("[n]o litigant will be permitted to approbate and reprobate – to invite error . . . and then to take advantage of the situation created by his own wrong.") (quoting *Cohn v. Knowledge Connections, Inc.*, 266 Va. 362, 367, 585 S.E.2d 578, 581 (2003)); *Hansen v. Stanley Martin Cos.*, 266 Va. 345, 358, 585 S.E.2d 567, 575 (2003).

Consolidation now attempts to advance an argument that is completely at odds with what it claimed in the state courts. Its effort should be rejected. To do anything less would improperly permit the repeated recasting of legal arguments and theories, defeat the important purpose of finality in judicial

proceedings, and diminish genuine due process claims.

The record plainly shows that Consolidation relinquished its right to rely upon additional evidence when it agreed that the circuit court and Supreme Court of Virginia could, and should, declare its legal rights by interpreting the unambiguous language of the 1956 Lease and 1937 Deed. Having maintained throughout this case that these documents are controlling and unambiguous, and having failed to assign cross-error to the circuit court's adjudication of its rights without additional evidence, Consolidation has firmly wedded itself to a determination of its legal rights on the existing record.

Indeed, even now Consolidation has pointed to no ambiguity within the 1956 Lease that would allow parol evidence. Due process does not require that a litigant be guaranteed the right to introduce evidence to contradict a court's interpretation of a document which the litigant has represented to be unambiguous. The Due Process Clause provides no safe harbor to Consolidation on this record.

B. Under Virginia law, Extrinsic Evidence is Not Considered in Ascertaining the Plain Meaning of an Unambiguous Contract.

Even without Consolidation's sweeping new arguments about its new-found documents, the Supreme Court of Virginia correctly decided the question of Consolidation's rights under the unambiguous 1956 Lease and 1937 Deed as a matter

of law. Virginia law does not permit the introduction of extrinsic evidence to interpret an unambiguous contract. *E.g., Langman v. Alumni Ass'n. of the Univ. of Va.*, 247 Va. 491, 498-499, 442 S.E.2d 669, 674 (1994). Rather, "when the terms of a contract are clear and unambiguous, a court must give them their plain meaning." *Pocahontas Mining L.L.C. v. Jewell Ridge Coal Corp.*, 263 Va. 169, 173, 556 S.E.2d 769, 771 (2002). No party, including Consolidation, has a due process right to present extrinsic evidence in aid of the interpretation of an unambiguous contract.

Therefore, contrary to Consolidation's assertion, the Supreme Court did not decide the declaratory judgment on "an incomplete record." (Pet. 10).⁸ It merely did what established Virginia law required and what Consolidation asked it to do. No due process violation can be found under these circumstances.

**II. THERE IS NO COMPELLING GROUND
TO GRANT CERTIORARI BECAUSE
THE DUE PROCESS CASES UPON
WHICH CONSOLIDATION RELIES DO
NOT CONFLICT WITH THE SUPREME
COURT OF VIRGINIA'S HOLDING.**

⁸ Consolidation builds its Petition upon the fiction that the circuit court decision was on appeal to the Supreme Court of Virginia only on the preliminary injunction. As the record reflects, the appealed order also contained a final ruling of declaratory judgment in favor of Consolidation based on the trial court's legal interpretation of the 1956 Lease.

Consolidation bases its constitutional challenge on the broad assertion that a state court decision that precludes an opportunity to present parol evidence to interpret unambiguous documents violates the Due Process Clause. (Pet. 1). In support of this assertion, Consolidation relies upon three of this Court's due process cases, each of which is a product of unique facts and circumstances which are absent here. (Pet. 1, 12). In two of the cases an unexpected change in the law during the appeal surprised the litigants and, in the last case, a court forfeited property without allowing the owner to make a claim or to answer the charge. Thus, the petitioner in each of these cases was genuinely surprised by the appellate court's decision, which deprived the litigants of the fundamental right to be heard. Unlike Consolidation, none of the petitioners in these cases had invited the state courts to decide a question of law on the existing record.

As the following discussion demonstrates, the cases which Consolidation offers in support of its due process argument are easily distinguishable and do not advance its due process claim.

Consolidation describes this Court's 1917 decision in *Saunders v. Shaw*, 244 U.S. 317 as virtually identical to the case at bar. (Pet. 2). Relying heavily upon this Court's three paragraph decision, Consolidation claims that *Saunders* "essentially decided the exact issue presented in this case" and has facts that "mirror the facts here." (Pet. 12). Consolidation is wrong.

Saunders is a tax case from Louisiana. The plaintiff landowner sought an injunction against the collection of a local drainage tax. *Id.* at 318. At trial, the plaintiff attempted to introduce evidence showing that his land was located outside the system, was actually an island in the Gulf of Mexico, and could not be benefitted by that system. *Id.* The defendant tax commissioners and an intervenor objected to the evidence, and the court excluded it. *Id.* The defendant then introduced evidence that the land was not in the Gulf of Mexico. *Id.* Following a judgment for the defendant and the intervenor, the plaintiff appealed. *Id.* at 318-319.

The Supreme Court of Louisiana affirmed the judgment. *Id.* at 319. However, on a petition for rehearing, it reversed the trial court's judgment and entered an injunction against the assessment of plaintiff's land. *Id.* The Louisiana court based its reversal of the trial court's opinion, and its own opinion, on a new decision from this Court, which was "decided after the first decision." *Id.* Applying the new decision, the Louisiana court relied upon the evidence offered by the plaintiff which had been ruled inadmissible, finding that "the answer and testimony showed that the land was low and marshy, had not been benefited or drained and could not be drained under the present system." *Id.* The Louisiana Court then refused the intervenor's request for a rehearing. *Id.*

Appealing to this Court, the intervenor raised a due process challenge, arguing that "the case had been decided against him without his ever having had the

proper opportunity to present evidence." *Id.* This Court agreed, holding:

when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view.

Id. Further, this Court held that the appeal properly could be taken because the "act complained of is the act of the [state] Supreme Court, done unexpectedly at the end of the proceeding, when [the defendant] no longer had any right to add to the record." *Id.* at 320.

Saunders bears little resemblance to this case. The Supreme Court of Virginia did not decide the declaratory judgment on the basis of a new decision, change in the law, or evidence that was ruled inadmissible at trial. Rather, it decided the question of Consolidation's legal rights on the basis of unambiguous agreements that Consolidation said were dispositive of the issue without further evidence. Nor can Consolidation legitimately claim, as the defendant could in *Saunders*, that the state appellate court's decision was unexpected. Having asked the Court to interpret the unambiguous agreements as a matter of law without resort to additional evidence, it cannot be surprised that it did so.

Consolidation's second authority, *Brinkerhoff-Faris*, also involved an unexpected change in the law – one rendered by the state appellate court itself. 281 U.S. 673 (1930). Like *Saunders*, this case concerns an action seeking to enjoin the collection of taxes. Plaintiff invoked the Missouri court's equity jurisdiction, alleging that it had no remedy at law and no administrative remedy. *Id.* at 674-675. The defendant maintained that the plaintiff "had not pursued remedies before the County or State Board of Equalization . . . [and] was guilty of laches in not so doing." *Id.* at 675. The trial court refused to hear the complaint, denied the injunction, and dismissed the case "without opinion or findings of fact." *Id.*

On appeal, the Missouri Supreme Court affirmed the trial court's decision. *Id.* It held that the plaintiff had an adequate legal remedy, and should have filed a complaint with the State Tax Commission in accordance with state law. *Id.* at 675-676. In so holding, however, the court "expressly overruled" a six-year-old decision in which it had held that the State Tax Commission did not have the "power to grant relief of the character here sought." *Id.* at 676. Further, the basis for this holding – that the plaintiff had an adequate legal remedy before the State Tax Commission – was not raised by any party during the litigation. *Id.* at 677. Although the defendant had asserted that the plaintiff had not availed itself of available administrative remedies before the Board of Equalization, "the answer significantly omitted any contention that there had been a remedy by application to the State Tax Commission." *Id.*

This Court reversed, holding that because the Missouri Supreme Court had denied the plaintiff "the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property." *Id.* at 679. Accordingly, the plaintiff was denied "an opportunity to present its case and be heard in its support." *Id.* at 681.

The unique facts in *Brinkerhoff-Faris* do not compel the same result here. Consolidation was not denied the opportunity to be heard because its case was rejected in the trial court or because of the unexpected abandonment of Virginia precedent at the appellate level. Rather, Consolidation's arguments to the circuit court established the framework for deciding the case on documents Consolidation vigorously argued both at trial and on appeal. Those arguments permitted the Supreme Court of Virginia, in accordance with well-established Virginia law, to do exactly what Consolidation invited it to do. *Brinkerhoff-Faris*, then, is distinguishable.

Finally, Consolidation mentions, but does not discuss, a third case in support of reversal of the decision below. (Pet. 1-2). Consolidation fails to explain how its due process argument is advanced by *Windsor v. McVeigh*, 93 U.S. 274 (1876), a case growing out of Civil War era legislation designed to "suppress insurrection, to punish treason and rebellion, [and] to seize and confiscate the property of [confederate] rebels." *Id.* at 275. Pursuant to this legislation, a landowner's property in Alexandria,

Virginia was seized and forfeited to the United States on the claim that he was a "rebel." *Id.* at 275-276. Although the landowner appeared by counsel and filed an answer and claim to the property, the court struck the claim and answer on the basis that he was residing "within the Confederate lines" and was "a rebel"; it then "immediately" condemned the property. *Id.* at 276. Thus, the forfeiture was accomplished "in a judicial proceeding to which [plaintiff] was not allowed to appear and make answer to the charges against him." *Id.*

The fundamental and obvious deprivation of property without due process in *Windsor* finds no analogue here. Consolidation was given notice of the hearing, filed an answer, and appeared with counsel. The fact that it will not have an opportunity to introduce two documents on the question whether it has the legal right to dump water in the VP3 Mine is a product of its own doing, not the State's action.

Nothing in *Saunders*, *Brinkerhoff-Faris* or *Windsor* provides a compelling reason to grant this Petition. The differences between these cases and the case at bar are so pronounced as to preclude any meaningful comparison. In short, the Supreme Court of Virginia's holding does not conflict with this Court's due process cases.

III. CONSOLIDATION'S PETITION IS NOT PROPERLY BEFORE THE COURT BECAUSE IT REASONABLY SHOULD HAVE EXPECTED THE SUPREME COURT OF VIRGINIA TO INTERPRET THE 1956 LEASE AND THE 1937 DEED

AS A MATTER OF LAW, WITHOUT PAROL EVIDENCE, AND THAT COURT DECLINED TO ENTERTAIN ITS DUE PROCESS CLAIM.

Consolidation incorrectly states that “there can be no doubt that the due process issue raised here is properly before the Court.” (Pet. 17). To the contrary, Consolidation has not satisfied the requirements for raising on *certiorari* a federal question not decided by state court.

A. The Federal Claim was “Not Pressed or Passed Upon” Below.

This Court will not review a federal constitutional issue raised for the first time on review of a state court decision. *Clark v. Arizona*, 548 U.S. 735, 765 (2006); *Howell v. Mississippi*, 543 U.S. 440, 443-45 (2005); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935). Unless the constitutional issue was “raised and decided” in the state court, *certiorari* will not be granted. *Cardinale*, 394 U.S. at 438. This principle, known as the “not pressed or passed upon” rule, is a roadblock to the exercise of this Court’s review in the present case.

The requirements of the rule are not met merely by filing a post-judgment motion for reconsideration containing a previously unadvanced constitutional claim. Rather, the state court must actually take up and analyze the question on its merits. *Herndon*, 295 U.S. at 443 (“The long-established general rule is that the attempt to raise a federal question after

judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it.") In *Herndon*, the appellant presented his constitutional question on a motion for rehearing after the state supreme court affirmed a judgment against him. The state court refused to consider the motion, and this Court found that this refusal did not satisfy the requirement that the state court "pass upon" the constitutional issue. *Id.* at 442-43.

Here, Consolidation's due process argument was not timely raised below or as an issue of cross-error on appeal. Rather, Consolidation presented its due process claim in a petition for rehearing after the Supreme Court of Virginia rendered its unanimous decision in this case. However, that Court declined to entertain the federal claim, leaving no record of a decision for this Court to review. These facts bring this case squarely under the rule.

B. No Exception to the "Not Pressed or Passed Upon" Rule Exists Because Consolidation Cannot Legitimately Claim Surprise that the Virginia Court Followed the Principles of Contract Interpretation as Consolidation Requested.

Nor can Consolidation avail itself of an exception to the "not pressed or passed upon" rule by claiming that it was surprised by the Virginia Court's ruling, and raised the issue at the first available opportunity (Pet. 17-18). The exception to the general rule, as articulated in *Herndon*, 295 U.S. at

443-444, is not so broad as to give Consolidation a right to *certiorari* simply because the Virginia court decided a question of state law in a manner unfavorable to it.

Consolidation plainly should have anticipated that the Supreme Court of Virginia would rule on the contract at issue as a matter of law in one way or another, just as the circuit court had done without any objection by Consolidation. It obviously hoped for a ruling in its favor, but the fact that the ruling went the other way does not create grounds to now complain about the process. In Virginia, the interpretation of the provisions of a contract presents a question of law that the appellate court reviews *de novo*. *Eure v. Norfolk Shipbuilding and Drydock Corp., Inc.*, 263 Va. 624, 634, 561 S.E.2d 663, 669 (2002) (“on appeal we are not bound by the trial court’s interpretation of the contract provision at issue; rather, we have an equal opportunity to consider the words of the contract within the four corners of the instrument itself.”) Thus, when Consolidation sought judicial interpretation of the unambiguous documents, it necessarily requested a determination of a question of law based solely on the four corners of those documents.

The very cases that Consolidation cites as support for its due process claim illustrate why it has not timely presented this Court with a federal claim for review. In *Saunders*, 244 U.S. at 320 and *Brinkerhoff-Faris Trust & Sav. Co.*, 281 U.S. at 676-677, the petitioners were legitimately surprised when the state appellate courts decided their cases by changing established legal principles and, in the

later case, by reversing controlling precedent. *Saunders* was decided on evidence that had been refused by the trial court, thereby depriving the petitioner of the any opportunity to challenge it. In *Brinkerhoff-Faris*, the state appellate court's decision was based upon a theory not advanced by either party, was made without giving the petitioner the first chance to make its case, and deprived the petitioner of the only available legal remedy it had. And, in a textbook due process case, the petitioner in *Windsor* simply never had a chance to be heard.

These cases all decided issues involving some question of fact as a matter of law without giving the petitioner an opportunity to be heard or contest the decision. Consolidation does not explain why the question of law the Supreme Court of Virginia decided on a record Consolidation claimed was complete now constitutes a federal constitutional violation. It cannot.

Consolidation cannot legitimately claim surprise that the Supreme Court of Virginia interpreted the 1956 Lease as a matter of law; this is exactly what it asked for all along. Consequently, the due process question is not properly before the Court.

IV. CONSOLIDATION'S PETITION FOR
CERTIORARI CHALLENGES JUST ONE
OF TWO GROUNDS FOR THE
SUPREME COURT OF VIRGINIA'S
RULING, PRECLUDING THIS COURT
FROM DECIDING A MATTER
DISPOSITIVE TO THE ENTIRE CASE.

Consolidation urges consideration of only the Pobst/Combs Deed and the 1908 Deed. Although these deeds are referred to in the 1937 Deed, they are not mentioned in the 1956 Lease. At most, then, the evidence that Consolidation now presents relates only to the interpretation of Levisa's rights under the 1937 Deed, not to whether Levisa granted such rights to Island Creek under the 1956 Lease.

The Supreme Court of Virginia interpreted both the 1937 Deed and the 1956 Lease, as Consolidation requested, and found that neither document conferred the rights Consolidation claimed. It specifically held that "... the lease did not expressly purport to convey any right to use the leasehold for the support of mining operations on other lands." (App. 4a). "Clearly, Island Creek did not stipulate for such a use of the leasehold in the 1956 lease, nor could Levisa Coal have granted such rights even if they had been sought." (App. 22a-23a). Because the Virginia court decided both issues as a matter of law, Consolidation's Petition addresses only one of the two independent grounds that support the Court's ruling – its interpretation of the 1937 Deed – while leaving the Court's interpretation of the 1956 Lease untouched.⁹

Thus, even if Consolidation is right that the 1908 Deed and the Pobst/Combs Deed bear upon a proper

⁹ Consolidation initially attempted to avoid this problem in its petition for rehearing by arguing that the Supreme Court of Virginia could not construe the 1956 Lease without Island Creek, which it claimed was a necessary party. However, Consolidation now has abandoned its necessary party argument.

interpretation of the 1937 Deed and even grant the right to dump water from foreign mining operations, the Supreme Court of Virginia's conclusion that Consolidation has no right to dump its wastewater in the VP3 Mine under the 1956 Lease is still an independent, and unchallenged, foundation for its decision in this case. No ruling by this Court, then, would pass upon the entire opinion by the Supreme Court of Virginia, rendering such review futile.

CONCLUSION

This case involves the simple application of traditional principles of state law to the question of whether Consolidation has a legal right to dump contaminated water into another's mine. The Supreme Court of Virginia correctly decided this issue within the four corners of the 1956 Lease and the 1937 Deed, which the parties agreed controlled determination of the question whether Consolidation had a legal right to dump its water into the VP3 mine. And it did so only after Consolidation invited the Court to interpret these documents without additional evidence. Thus, Consolidation's own words and actions defeat its due process claim.

Nor is the due process claim properly before the Court. The Supreme Court of Virginia did not decide the issue, which Consolidation presented only after it received an unfavorable interpretation of the controlling documents in the case. Further, Consolidation finds no shelter from the "not pressed or passed upon" rule because it could not be surprised that the documents were interpreted as a

matter of law, in accordance with well-established Virginia law and its own request.

Consequently, this Court should deny the Petition.

Respectfully submitted,

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